No. 87-1983

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

NATHANIEL JOHNSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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24pp

QUESTION PRESENTED

Whether Articles 16(1)(A) and 52(a)(2) of the Uniform Code of Military Justice, 10 U.S.C. (& Supp. IV) 816(1)(A) and 852(a)(2), violate the Constitution by permitting a defendant to be convicted by the two-thirds vote of a court-martial panel containing as few as five members.

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OPINIONS BELOW

The order of the Court of Military Appeals affirming petitioner's conviction (Pet. App. 1a) is reported at 26 M.J. 222. The order of the Army Court of Military Review (Pet. App. 2a-3a) is not officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 4, 1988. The petition for a writ of certiorari was filed on June 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was convicted by court-martial of premeditated murder and the unlawful possession of a murder weapon, in violation of Articles 118 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918 and 934. Petitioner was sentenced

to confinement for life, a reduction in pay grade, forfeitures of all pay and allowances, and a dishonorable discharge.[1] The convening authority reviewed the case and approved the sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 2a-3a). The Court of Military Appeals summarily affirmed (Pet. App. 1a).

1. Petitioner was convicted of the premeditated killing of Sergeant Aaron Britton. The facts were not in dispute; petitioner's sworn confession (GX 5) was admitted at trial without defense objection (Tr. 17, 216-218). The defense claim was that petitioner was guilty only of voluntary manslaughter (Tr. 279).

At 9:30 p.m. on December 5, 1987, petitioner was in his barracks room at Fort Eustis in Virginia. Sergeant Britton entered petitioner's room and accused petitioner of spreading the rumor that Sergeant Britton was dating Private Tracy Johnson (Tr. 165; GX 5).[2] Petitioner denied

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[1] The convening authority elected to refer petitioner to a court-martial that was not authorized to impose the death penalty (Tr. 10). *Manual for Courts-Martial, United States – 1984 (Manual),* Rules for Court-Martial 201(f)(1)(A)(iii) and 601(c). The minimum punishment for premeditated murder is confinement for life. Art. 118, UCMJ, 10 U.S.C. 918. Although a two-thirds vote was necessary to convict petitioner, a three-fourths vote was necessary to impose a sentence of life imprisonment, even though that penalty was mandatory under the UCMJ. Rule 1006(d), *Manual.* That difference is immaterial in this case, however, because four of the five panel members had to concur in the judgment regardless of whether a two-thirds or three-fourths majority vote requirement is applied.

[2] Sergeant Britton and Private Tracy Johnson were members of the same unit. Private Tracy Johnson testified that petitioner told her that he intended to tell the platoon sergeant about the relationship between her and Sergeant Britton (Tr. 207). Carrying on a relationship with a military subordinate could damage Sergeant Britton's professional reputation and could violate the Uniform Code of Military Justice under some circumstances. See *United States* v. *Clarke,* 25 M.J. 631 (A.C.M.R. 1987); *United States* v. *Stocken,* 17 M.J. 826 (A.C.M.R. 1984).

the charge. The incident ended with Sergeant Britton telling petitioner that if he continued to spread the rumor, they would "handle it like men" (Tr. 165-166, 167; GX 5).

Shortly thereafter, Sergeant Britton arranged for petitioner to be called out of the room purportedly to answer a telephone call (Tr. 171; GX 5). The lights in the hall outside the room were turned out as part of the plan (Tr. 171). After answering the phone, petitioner was attacked by Sergeant Britton, and perhaps Privates Mayrant and Conners (Tr. 171-173; GX 5). Petitioner and Sergeant Britton fell to the floor and wrestled until petitioner was able to break free (Tr. 172; GX 5). Sergeant Britton then went to the opposite end of the hall, while petitioner returned to his room (Tr. 135, 151, 172; GX 5).

By his own admission, petitioner was angry (GX 5). He "stopped for awhile" and thought to himself (*ibid.*). Then, after "look[ing] into the mirror and t[aking] a deep breath," he grabbed his survival knife and went to find Sergeant Britton (*ibid.*). Petitioner walked quickly up the hallway,[3] turning on lights and repeating, "I don't play that shit, they don't do that to me" and "I'm going to kill him" (Tr. 110, 125, 136, 152-154, 172). Specialist Allen stopped petitioner and suggested that they discuss the matter (Tr. 110-111). Petitioner replied, "no, I'm gonna get him" (Tr. 111).[4] Petitioner walked past Allen toward Sergeant Britton (*ibid.*). As he approached the sergeant, petitioner thrust his knife forward, piercing Sergeant Britton's heart and killing him (Tr. 112, 152-154; GX 9).

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[3] Petitioner walked approximately 66 feet to return to his room from the fight (GXs 1, 5). He traveled an additional 198 feet from his room to the point where he stabbed Sergeant Britton (GX 2B).

[4] Private Joyce Tucker had spoken with petitioner earlier in the day. She testified that petitioner had told her "something was going down in the unit tonight," and that "if anybody messed with him they would get it" (Tr. 150).

2. Seven potential panel members[5] were detailed to petitioner's court-martial (Tr. 27). One was challenged for cause by the government, since she had prior knowledge of the case (Tr. 87-88). Another was peremptorily challenged by the government (Tr. 89). The defense did not challenge any of the remaining members (Tr. 88-89).[6] The defense moved the trial judge to empanel six members to hear the case and to determine whether the verdict was unanimous (Tr. 91, 234-237, 320-322). The trial judge denied both motions (Tr. 91-92, 323-324).

ARGUMENT

In *Ballew* v. *Georgia*, 435 U.S. 223 (1978), the Court held that the Sixth and Fourteenth Amendments require that at least six persons serve on the jury in serious state criminal cases. In *Burch* v. *Louisiana*, 441 U.S. 130 (1979), the Court ruled that the verdict by such a six-person jury must be unanimous. Relying on *Ballew* and *Burch*, petitioner maintains that his conviction by a potentially nonunanimous five-member court-martial panel violates the Due Process Clause

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[5] All the court members were officers (Tr. 1). Petitioner did not exercise his right to request that one-third of the court members be from the enlisted ranks. Art. 25(c), UCMJ, 10 U.S.C. (& Supp. IV) 825(c). Under the circumstances of this case, such a request could not be denied. *Ibid.*

[6] The prosecution and defense are entitled to one peremptory challenge each as a matter of right. Art. 41, UCMJ, 10 U.S.C. 841; compare *United States* v. *Carter*, 25 M.J. 471 (C.M.A. 1988) (trial judge may award an accused additional peremptory challenges to ensure a fair trial). Had petitioner exercised his peremptory challenge in this case, the number of members would have been reduced to four. Because a general court-martial must have at least five members, Art. 16, UCMJ, 10 U.S.C. (& Supp. IV) 816, the exercise of a peremptory challenge by the defense would have required the convening authority to detail sufficient additional members to create a panel of at least five members.

of the Fifth Amendment.[7] That claim does not warrant review by this Court, for several reasons.[8]

1. There is no conflict among the circuits on the question presented by petitioner. The Court of Military Appeals has consistently rejected the contention that the court-martial system adopted by Congress is invalid under *Ballew* v. *Georgia, supra,* and *Burch* v. *Louisiana, supra,* on the ground that a defendant may be convicted by a five-member court-martial panel, or by the two-thirds vote of a panel of any size. *United States* v. *Mason,* 24 M.J. 127, 128 & n.* (C.M.A. 1987), cert. denied, No. 86-1935 (Oct. 9, 1987); *United States* v. *Hutchinson,* 17 M.J. 156, 156-157, 18 M.J. 281 (C.M.A.), cert. denied, 469 U.S. 981 (1984); see *United States* v. *McClain,* 22 M.J. 124, 128 (C.M.A. 1986); *United States* v. *Kemp,* 22 C.M.A. 152, 154, 46 C.M.R. 152, 154 (1973) (the Sixth Amendment cross-section requirement is inapplicable to court-martial panels). The decisions of that court are consistent with the decision of the only federal court of appeals to address this question in light of *Ballew* and *Burch*. *Mendrano* v. *Smith,* 797 F.2d 1538, 1544-1547 (10th Cir. 1986).

2. In addition, the decision below is also correct. The statutes governing the number of members on court-martial panels and the number that must concur to return a verdict do not offend either the Fifth or Sixth Amendments to the Constitution.

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[7] The Uniform Code of Military Justice does not provide a means of discovering the actual vote of the panel members. Thus, it is unknown whether petitioner was in fact convicted by a unanimous vote of the panel or by a vote of four to one.

[8] This Court has previously denied certiorari in several other cases presenting substantially the same question. *Mason* v. *United States,* cert. denied, No. 86-1935 (Oct. 19, 1987); *Delacruz* v. *United States,* cert. denied, No. 86-1675 (May 18, 1987); *Dodson* v. *United States,* cert. denied, No. 86-407 (Dec. 8, 1986); *Garwood* v. *United States,* cert. denied, 474 U.S. 1005 (1985); *Hutchinson* v. *United States,* cert. denied, 469 U.S. 981 (1984).

a. Petitioner seeks to impose on courts-martial the same requirements that Art. III, § 2, Cl. 3, and the Sixth Amendment impose in civilian cases. It is well settled, however, that the right to a jury trial guaranteed by those provisions does not apply to court-martial proceedings. *Ex parte Milligan,* 71 U.S. (4 Wall.) 2, 123 (1866); *Dynes* v. *Hoover,* 61 U.S. (20 How.) 65, 79 (1858).[9] The Fifth Amendment specifically exempts "cases arising in the land or naval forces" from the requirement of an indictment by a grand jury for serious crimes.[10] By drafting the Fifth Amendment in that manner, "the framers of the constitution, doubtless, meant to limit the right to trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan,* 71 U.S. (4 Wall.) at 123. As the Court explained in *Ex parte Quirin,* 317 U.S. 1, 39 (1942), neither Section 2 of Article III of the Constitution nor the Sixth Amendment requires a trial

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[9] See also *O'Callahan* v. *Parker,* 395 U.S. 258, 261 (1969), overruled on other grounds, *Solorio* v. *United States,* No. 85-1581 (June 25, 1987); *Reid* v. *Covert,* 354 U.S. 1, 19 (1957) (plurality opinion); *Whelchel* v. *McDonald,* 340 U.S. 122, 127 (1950); *Ex parte Quirin,* 317 U.S. 1, 40-41 (1942); *Kahn* v. *Anderson,* 255 U.S. 1 (1921); *Mendrano* v. *Smith,* 797 F.2d at 1544; *King* v. *Moseley,* 430 F.2d 732, 734 (10th Cir. 1970); *Branford* v. *United States,* 356 F.2d 876, 877 (7th Cir. 1966); *Owens* v. *Markley,* 289 F.2d 751, 752 (7th Cir. 1961); see *DeWar* v. *Hunter,* 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (court-martial panel composed exclusively of officers to try an enlisted man does not violate the Sixth Amendment); see generally Van Loan, *The Jury, the Court-Martial, and the Constitution,* 57 Cornell L. Rev. 363 (1972); Henderson, *Courts-Martial and the Constitution: The Original Understanding,* 71 Harv. L. Rev. 293 (1957).

[10] Petitioner erroneously suggests (Pet. 10-11 n.4) that the exception for "cases arising in the land or naval forces" applies only when a case arises "in actual service in time of war or public danger." The latter phrase refers only to the "Militia" of the states, not to the "land or naval forces" of the United States. *Johnson* v. *Sayre,* 158 U.S. 109 (1895).

by jury in the military, because those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right." Accordingly, because petitioner had no Article III or Sixth Amendment right to a trial by a petit jury, he also had no right under those provisions to a unanimous vote by a jury composed of at least six persons.

b. Petitioner's claim fares no better under the Due Process Clause. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces" (Art. I, § 8, Cl. 14) and grants Congress "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio* v. *United States,* No. 85-1581 (June 25, 1987), slip op. 12; see also *Burns* v. *Wilson,* 346 U.S. 137, 140 (1953) (plurality opinion). Congress's judgment about the composition and voting procedures of a court-martial is entitled to special deference, not only because "[t]he constitution of courts-martial, like other matters relating to their organization and administration * * *, is a matter appropriate for congressional action" (*Whelchel* v. *McDonald,* 340 U.S. 122, 127 (1950) (citations omitted)),[11] but also because the practices at issue have been carried forward from the earliest days of our nation. See *Solorio* v. *United States,* slip op. 7-11.

The nation's first military law was the American Articles of War of 1776. 1 & 2 W. Winthrop, *Military Law and Precedents* 46, App. 961-971 (2d ed. 1920). Section 14,

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[11] See also, *e.g.*, *Rostker* v. *Goldberg,* 453 U.S. 57, 64-65 (1981) (the decisions of Congress are entitled to particular deference when they involve "Congress' authority over national defense and military affairs").

Art. 1, provided that at least 13 officers would serve on general courts-martial (*i.e.*, a president and 12 members). 5 J. Continental Cong. 800 (W. Ford ed. 1906); 1 & 2 W. Winthrop, *supra,* App. 967. In 1782, Congress substantially adopted the English practice for naval courts-martial of detailing five officers to a court-martial in a capital case and three in a noncapital case. 22 J. Continental Cong. 325 (G. Hunt ed. 1914). Four years later, when large numbers of desertions and an understaffing of officers had become a particularly acute problem for commanders at frontier outposts, Congress amended the American Articles of War to permit a quorum of five officers at a general court-martial and three officers at regimental courts-martial when 13 members could not be detailed "without manifest injury to the service." 30 J. Continental Cong. 145, 316 (J. Fitzpatrick ed. 1786); 1 & 2 W. Winthrop, *supra,* at 22-23, App. 972; Van Loan, *The Jury, the Court-Martial, and the Constitution,* 57 Cornell L. Rev. 363, 384-385 n.118 (1972). That language was merely advisory to the officer responsible for appointing the members of a court-martial, however, and his decision to select a small number of members was both lawful and conclusive. *Martin* v. *Mott,* 25 U.S. (12 Wheat.) 19, 34-35 (1827).[12]

Congress endorsed that practice throughout the nineteenth century and the early part of the twentieth century when revising the Articles of War. 1 & 2 W. Winthrop, *supra,* at 77, 159; American Articles of War of 1806, ch. 20, Art. 64, 2 Stat. 367, *reprinted in* 1 & 2 W. Winthrop, *supra,* App. 981-982; American Articles of War of 1874, Art. 75, *reprinted in* 1 & 2 W. Winthrop, *supra,* App. 992;

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[12] See also *Bishop* v. *United States,* 197 U.S. 334, 339-340 (1905); *Mullan* v. *United States,* 140 U.S. 240, 245 (1891) (convening officer's determination that trial by members junior in rank to the accused could not be avoided was proper).

American Articles of War of 1916, ch. 418, Art. 43, 39 Stat. 657. In the aftermath of World War II, Congress replaced the Articles of War with the Uniform Code of Military Justice. In so doing, Congress retained the requirement of a quorum of five members for general courts-martial, as well as the convening authority's discretion to detail a greater number of panel members, the system that exists today. Art. 16, UCMJ, 10 U.S.C. (& Supp. IV) 816.

History also shows that unanimity has never been a feature of court-martial proceedings.[13] The American Articles of War of 1776, like their predecessor, the British Articles of War,[14] required only a simple majority vote to convict a defendant, and a two-thirds majority to sentence him to death. Articles of War of 1776, § 14, Art. 5, *reprinted in* 5 J. Continental Cong. 801 (W. Ford ed. 1906); 1 & 2 W. Winthrop, *supra,* at 377, App. 968; A. Macomb, *A Treatise on Martial Law and Courts-Martial* 144 (1809). Congress thereafter repeatedly endorsed similar majority vote requirements in statutes passed in 1799, 1800, 1806, and 1874.[15] Throughout the nineteenth century, a majori-

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[13] During the Revolution, the Continental Congress adopted the British naval regulations for use by the Continental Navy. The British regulations provided for courts-martial similar to the general courts-martial under the British Articles of War, which required only a simple majority to convict and sentence a defendant. Van Loan, *supra,* 57 Cornell L. Rev. at 382 & n.102.

[14] The British Articles of War required a vote of 9 of 13 court-martial members to impose the death penalty. 1 & 2 W. Winthrop, *supra,* App. 943, § 15, Art. VIII. The Articles of War did not specify the number of votes necessary to convict a defendant at a general court-martial or to impose any sentence other than death. The Articles of War, however, provided that inferior courts-martial "shall give Judgment by the Majority of Voices." 1 & 2 W. Winthrop, *supra,* App. 943, § 15, Art. XII; see R. Scott, *The Military Law of England* 131 (1810).

[15] Act of Mar. 2, 1799, ch. 24, 1 Stat. 709 (An Act for the Government of the Navy of the United States); Act of Apr. 23, 1800, ch. 33,

ty vote of the panel members was sufficient to convict a defendant of a noncapital crime, with a two-thirds vote sufficient to impose capital punishment. 1 & 2 W. Winthrop, *supra,* at 377; *Stout* v. *Hancock,* 146 F.2d 741, 742-743 (4th Cir. 1944), cert. denied, 325 U.S. 850 (1945).

Early in the twentieth century, Congress modified the voting requirements for Army courts-martial, requiring a unanimous vote to impose the death penalty or to convict a defendant of a crime carrying a mandatory death penalty. Act of June 4, 1920, ch. 227, Art. 43, 41 Stat. 795-796; *Stout* v. *Hancock,* 146 F.2d at 741-743. For all other crimes, conviction still required only a two-thirds majority. At the same time, the voting requirements for courts-martial in the Navy were left untouched. Thus, only a simple majority was necessary to convict a sailor, and a two-thirds majority to impose the death penalty. See H.R. Rep. 491, 81st Cong., 1st Sess. 26, 491, 74 (1949). When considering the UCMJ following World War II, Congress rejected the suggestion that the unanimous vote requirement be extended to noncapital crimes,[16] and instead adopted Article 52 of the UCMJ, 10 U.S.C. 852, in substantially its present form.

Congress has modified the Code on more than 20 occasions since Articles 16 and 52 were enacted, but it has never changed the composition or voting procedures for noncapital cases tried by a court-martial.[17] In sum, it is clear

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§ 1, Art. 41, 2 Stat. 51 (An Act for the Better Government of the Navy of the United States); the American Articles of War of 1806, ch. 20, Art. 87, 2 Stat. 369, *reprinted in* 1 & 2 W. Winthrop, *supra,* App. 984; the American Articles of War of 1874, Art. 96, *reprinted in* 1 & 2 W. Winthrop, *supra,* App. 994.

[16] See *Uniform Code of Military Justice (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 565, 1081-1082 (1949).

[17] In 1984, Congress enacted amendments to the UCMJ to coincide with proposed changes to the *Manual for Courts-Martial.* Concur-

that the five-member, two-thirds majority vote procedures in Articles 16(1)(A) and 52(a)(2) of the UCMJ, 10 U.S.C. (& Supp. IV) 816(1)(A) and 852(a)(2), represent the longstanding and considered judgment of Congress and the President on the proper balance to be struck between the rights of an individual serviceman and the special needs of the armed forces.

That judgment is also reasonable. The essential function of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles,* 350 U.S. 11, 17 (1955). When servicemembers are diverted from that function by the need to serve as panel members, "the basic fighting purpose of armies is not served." *Ibid.* Congress therefore has determined that the diversion of resources necessary to conduct the retrials that would result from a unanimous verdict requirement was too high a price to pay in terms of lost military preparedness. Accordingly, Congress provided for only one trial, at which a two-thirds majority vote would decide the outcome.

That system does not exclusively favor the prosecution. The rule that no retrials are permitted in the military if there is a "hung jury" provides a defendant with "a significant recompense" for the disadvantages of a nonunanimous verdict. *Mendrano* v. *Smith,* 797 F.2d at 1546. Moreover, as a safeguard against an inaccurate verdict by a court-martial panel, the military courts have required the prosecution independently to prove the defendant's guilt before a court of military review. The standard of review applied by a court

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rently, the President, acting pursuant to his rule-making authority, promulgated the current Manual, which significantly changed courts-martial practice. In 1986, the President again amended the Manual by requiring that findings of guilty to premeditated murder in capital cases be unanimous. Rule 1004, *Manual.* Notwithstanding these revisions, neither the President nor Congress required unanimity in other situations.

of military review to determine whether the evidence is sufficient to support the defendant's conviction is substantially different from, and more generous to, military defendants than the standard employed by civilian appellate courts. A civilian appellate court does not inquire whether *it* believes that the evidence is sufficient to prove the defendant's guilt beyond a reasonable doubt, but instead only determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia,* 443 U.S. 307, 319 (1979) (emphasis in original). By contrast, a court of military review must independently review the record and be convinced of the correctness of the court-martial panel's findings, including its ultimate finding that the accused is guilty, before the findings may be upheld. Art. 66(c), UCMJ, 10 U.S.C. 866(c).[18]

In addition to the more exacting standards of appellate review, the military defendant enjoys greater rights than his civilian counterpart at the pretrial and post-trial stages of the proceedings. No charge may be referred to a general court-martial for trial without an impartial investigation into the evidence supporting the charge. Art. 32, UCMJ, 10 U.S.C. 832. This procedure includes the right of the accused to be represented by counsel. A convening authority may not refer a charge to a general court-martial for trial

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[18] A court of military review may affirm "only such findings of guilty * * * as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. 866(c). Although nothing in the text of the statute or its legislative history suggests that the courts of military review must independently apply the "beyond a reasonable doubt" standard to the record when reviewing the sufficiency of the evidence (see *Jackson* v. *Taylor,* 353 U.S. 569, 577 & n.8 (1957)), the military courts have read that standard into the act. *E.g., United States* v. *Palenius,* 2 M.J. 86, 91 n.7 (C.M.A. 1977).

without independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. (Supp. IV) 834(a). After trial, the convening authority receives a report of the trial, and he may disapprove findings of guilt or reduce the sentence as a matter of clemency or as a prerogative of command. Art. 60, UCMJ, 10 U.S.C. (& Supp. IV) 860. To assist the convening authority, the accused has the right to submit legal arguments and other matters with respect to the findings and sentence. *Ibid.* See generally, *United States* v. *Boland,* 1 M.J. 241 (C.M.A. 1975); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant,* 22 Me. L. Rev. 105 (1970). In light of these special protections against the risk of inaccurate verdicts in the military justice system, petitioner has not made the "extraordinarily weighty" case necessary to overcome the longstanding congressional judgment that the court-martial system satisfies due process requirements. *Middendorf* v. *Henry,* 425 U.S. 25, 44 (1976).

c. The lead opinion in *Ballew* v. *Georgia, supra,* relied heavily on empirical studies of the group dynamics of juries in ruling that a six-person jury was required. 435 U.S. at 231-243 (opinion of Blackmun, J.). Much the same reasoning formed the basis for the ruling in *Burch* v. *Louisiana* that a six-person jury must be unanimous. 441 U.S. at 138. Petitioner argues (Pet. 8-9) that the studies considered in *Ballew* should also inform the decision here. Those studies all involved civilian juries, however, and there are no comparable studies addressing the dynamics of court-martial panels. In light of the important functional and compositional differences between civilian juries and court-martial panels, the studies on which this Court relied in *Burch* and *Ballew* are not immediately applicable to the military setting. *United States* v. *Guilford,* 8 M.J. 598, 601-602 (A.C.M.R. 1979), petition denied, 8 M.J. 242 (C.M.A.

1980).[19] The question whether studies of the type considered in *Ballew* are sufficiently compelling, when applied to the military setting, to justify a change in court-martial procedures is one that should be left to Congress.

3. Petitioner suggests (Pet. 4, 11-12) that this Court's recent decision in *Solorio* v. *United States, supra,* requires a different result. He argues that the procedures at issue may have been permissible before *Solorio*, but are no longer justified now that the Court has altered the service-connection restriction on courts-martial. That argument is misdirected.

The *Solorio* decision did not abolish the service-connection requirement; it merely reaffirmed the traditional principle that an offense is sufficiently service-connected for purposes of court-martial jurisdiction if the defendant is a servicemember at the time of the commission of the crime and at trial. The effect of *Solorio* is not to convert the military justice system into one closely analogous to a

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[19] In *Burch*, the Court concluded that juries must have at least six members, in part "to provide a fair possibility that a cross section of the community would be represented." 441 U.S. at 135, citing *Williams* v. *Florida*, 399 U.S. 78, 100 (1970). That goal is inapplicable to courts-martial. The members of a civilian jury are selected at random to represent a cross-section of the community. By contrast, the members of a court-martial panel are deliberately chosen on the basis of their qualifications to sit as panel-members. Art. 25, UCMJ, 10 U.S.C. (& Supp. IV) 825. The members of a court-martial panel are drawn exclusively from the same profession as the defendant, and they have a specialized knowledge of its workings and expectations. Accordingly, the failure randomly to select a court-martial panel from a pool of all servicemen, including enlisted personnel with the same rank as the defendant, is not unconstitutional. *DeWar* v. *Hunter*, 170 F.2d at 997 (panel composed exclusively of officers to try an enlisted man does not violate Sixth Amendment); *United States* v. *McClain*, 22 M.J. at 128 (Sixth Amendment cross-section requirement inapplicable to court-martial proceedings); see *Mendrano* v. *Smith*, 797 F.2d at 1544-1547.

civilian system, in which Fifth and Sixth Amendment principles apply just as they do in the civilian courts. *Solorio* simply restored court-martial jurisdiction to a class of cases, not covered during the 18-year period following *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), consisting of certain cases in which the crimes were committed by servicemembers off the premises of military bases. The rules regarding the number and voting requirements of court-martial panels were adopted prior to the Court's decision in *O'Callahan*, not during the period between *O'Callahan* and *Solorio*. Moreover, there is no historical or logical connection between the service-connection restriction, as applied in *O'Callahan*, and the court-martial rules at issue here. The decision in *Solorio* therefore has no effect on the validity of those rules in the military justice system.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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